

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTWAIN DEANJELO PRINCE, a/k/a
ANTUAN DEANJELO PRINCE, a/k/a
ANTUAIN DEANGELO PRINCE,

Defendant-Appellant.

UNPUBLISHED

July 26, 2007

No. 268084

Jackson Circuit Court

LC No. 05-007065-FH

Before: Murphy, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). He was sentenced as a third habitual offender, MCL 769.11, to a prison term of 5 to 40 years to be served consecutively to the remainder of a sentence for which defendant had been on parole. Because the trial court did not abuse its discretion in admitting evidence that defendant was on parole at the time of his arrest, any misconduct on the prosecutor's part did not necessitate reversal, and the trial court's upward departure from the sentencing guidelines was supported by substantial and compelling reasons, we affirm.

Defendant's conviction arose from his arrest as a parole absconder. The police found a bag containing five separately wrapped cocaine rocks in the area where defendant had been standing prior to his arrest. When the police questioned defendant about the cocaine, he initially denied it was his. According to the police, after further questioning defendant acknowledged that the cocaine had been fronted to him. Defendant, however denied making such an admission.

Defendant first argues that the trial court abused its discretion in admitting testimony that he was on parole at the time of his arrest, as the prejudicial effect of the evidence outweighed its probative value under MRE 403. We disagree.

We review this preserved objection to the trial court's evidentiary rulings for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). To be admissible,

evidence of prior bad acts must be offered for a proper purpose and must be relevant. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), mod on other grounds 445 Mich 1205 (1994). In addition, the probative value of the evidence must not be substantially outweighed by its prejudicial effect. *Id.*

Here, the evidence of defendant's status as a parolee was offered for a proper purpose, i.e., to provide a chronological explanation for defendant's arrest and to establish the validity of the arrest. Testimony was given establishing that the officers were patrolling a certain area and saw defendant, whom at least one of them knew to be on parole. The officers then made contact with defendant and the events leading to the discovery of the drugs followed. Evidence of such chronologically related events is admissible if the evidence is necessary to allow the jury to hear the "complete story" of the case. *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). Further, evidence of underlying charges can be admissible when the charges are necessary to understand the validity of an arrest. See *People v Taylor*, 252 Mich App 519, 522; 652 NW2d 526 (2002).

The evidence was also relevant. A central issue in the case was the conflicting testimony describing defendant's arrest and admission to the police. The evidence that the officers had a valid reason to arrest defendant tended to prove the accuracy and credibility of their version of the events. The fact that the same evidence involved disclosure of defendant's status as a parolee did not render the evidence inadmissible. Where, as here, potentially prejudicial evidence is necessary to enable a jury to understand the events in the case, a trial court is within its discretion to find that the probative value is not substantially outweighed by the prejudicial effect of the evidence. See *Taylor, supra* at 522.¹

Defendant next asserts that the prosecutor committed misconduct requiring reversal by stating, "there's no testimony that [defendant] had a job. He's got to live somehow." We review this preserved claim of constitutional error de novo to determine whether defendant was denied a fair and impartial trial due to prosecutorial misconduct. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

The record in this matter contained no evidence concerning defendant's employment status. Given the lack of such evidence, the prosecutor's reference to a job was improper. A prosecutor may not use closing argument to present facts that are not in evidence. See, e.g.,

¹ Defendant maintains that the prejudicial effect of the testimony was compounded by his appearance at trial in a prison jumpsuit. Although the transcript suggests that defendant was wearing an orange jumpsuit at trial, there is no indication in the record that defendant sought to wear civilian clothing or objected to wearing the jumpsuit. Defendant thus cannot complain of prejudice arising from his clothing. As our Supreme Court has stated, "[d]efendant had the right to be dressed in civilian garb but there was a failure to make timely protest of the denial of such right." *People v Shaw*, 381 Mich 467, 475; 164 NW2d 7 (1969).

People v Stanaway, 446 Mich 643, 686; 521 NW2d 557 (1994). Further, as defendant points out, the Michigan courts have confirmed that a prosecutor may not build an argument against a defendant based solely on the defendant's economic or employment status. *People v Johnson*, 393 Mich 488, 496-497; 227 NW2d 523 (1975); *People v Stanton*, 97 Mich App 453, 460; 296 NW2d 70 (1980). In addition, the prosecutor's statement impermissibly suggested that defendant had a burden to prove his economic means. A prosecutor may not attempt to shift the burden of proof to the defendant. *Abraham, supra* at 273.

Although we disapprove of the prosecutor's conduct, we find that in context, the improper argument was an isolated reference that was cured by the trial court's response. Immediately following the statement, the trial court sustained defense counsel's objection and noted that there had been no testimony concerning a job. In addition, the court instructed the jury that statements and arguments by lawyers are not evidence, and that the prosecutor must prove each element of the charged offense beyond a reasonable doubt. This type of instruction can dispel prejudice arising from improper statements by a prosecutor. See *People v Sinclair*, 247 Mich App 685, 691; 638 NW2d 120 (2001). Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Given the curative instructions, we find that the prosecutor's statement, though improper, does not require reversal.

Defendant's last argument is that the trial court upward departure from the sentencing guidelines was not supported by substantial and compelling reasons. We disagree.

This Court's review of a trial court's departure from the sentencing guidelines involves a three part standard. First, the Court reviews the trial court's finding that a factor for departure exists for clear error. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). Second the Court confirms de novo that the findings are objective and verifiable. *Id.* Finally, the Court reviews for an abuse of discretion the trial court's determination that the factors are substantial and compelling reasons for departure from the sentencing guidelines. *Id.*

The trial court found that the sentencing guidelines did not adequately reflect defendant's multiple cocaine convictions, his poor parole record, or his inability to stay away from cocaine. These findings were objective and verifiable, and were supported by the record. The record of convictions in the presentence investigation established that since May 2001, defendant has never lasted a year without a cocaine conviction except when he was incarcerated. Further, the record established that defendant had multiple parole violations in the months preceding his current offense.

This Court has recognized that prior related convictions can be a substantial and compelling reason to depart upward from the sentencing guidelines. *People v Hicks*, 259 Mich App 518, 536-537; 675 NW2d 599 (2003). Similarly, our Supreme Court has noted that a defendant's conduct while on probation can be considered a substantial and compelling reason for departure. *People v Hendrick*, 472 Mich 555, 565; 697 NW2d 511 (2005). Although departures from the sentencing guidelines are appropriate only in exceptional cases, *Babcock, supra* at 258, the trial court was within its discretion in determining that this is such an

exceptional case. An upward departure from the sentencing guidelines was justified by defendant's record of repeated cocaine-related convictions and parole violations.

Affirmed.

/s/ William B. Murphy

/s/ Michael J. Talbot

/s/ Deborah A. Servitto